Editor's note: Appealed – sum. judg. for U.S. sub nom. US v. Webb (ejectment action), (D. Ariz. Sept. 18, 1978), vacated and remanded, No. 79-3484 (9th Cir. Sept. 8, 1981), 655 F.2d 977, sum. judg. for U.S. (D. Ariz. Nov. 9, 1982), aff'd, No. 83-1595 (9th Cir. Nov. 21, 1983) cert. denied, S.Ct. No. 83-1405 (May 14, 1984), 466 US 972, 104 S.Ct. 2347; see also Hiram Webb, 105 IBLA 290 (Nov. 8, 1988).

UNITED STATES
v.
H. B. WEBB

IBLA 70-33 Decided October 15, 1970

Mining Claims: Discovery: Generally

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

Administrative Practice – Rules of Practice: Generally – Mining Claims: Contests – Res Adjudicata

The fact that a mining claim may at one time have been found to be a valid claim does not estop the Department, under the principle of res judicata, from bringing adverse proceedings against the claim when an application for patent to the claim is filed.

Mining Claims: Patent – Mining Claims: Discovery

An application for a mineral patent will be rejected and the mining claim declared null and void where, although the claim may formerly have been valuable for minerals, it is not shown as a present fact that the land is mineral in character and is valuable for its mineral content.

IBLA 70-33 : Arizona Contest Nos. 032789

and 034090

UNITED STATES	:	Lode mining claims declared
v.	:	null and void and patent
H. B. WEBB	:	applications rejected.
	:	Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

H. B. Webb has appealed from a decision dated January 31, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed the decision of a hearing examiner dated March 29, 1967, declaring certain designated mining claims situated in secs. 21 and 22, T. 4 N., R. 3 E., G. & S.R.M., Maricopa County, Arizona, to be null and void for want of a discovery of a valuable mineral deposit within the limits of each claim and rejecting the patent applications for the claims.

The contested mining claims are approximately eighteen miles north of Phoenix, Arizona, west of Cave Creek Road in the southern Union Hills. Contest proceedings were initiated by the Bureau of Land Management by complaints dated May 17, 1965, charging that valuable minerals have not been found within the limits of the Leo Nos. 1, 2, 3 and 4, Alta Vista Nos. 1 and 2 and Turkey Track No. 3 so as to constitute a valid discovery within the meaning of the mining laws. the contestee filed an answer denying the charges generally. At the hearing it was disclosed that in a previous contest, Arizona Contest No. 10013, the complaint against the Leo Nos. 2 and 4, Alta Vista Nos. 1 and 2, and Turkey Track No. 3 lode mining claims was dismissed by a hearing examiner on December 23, 1957, for the reason that the contestant failed to show by a preponderance of the evidence that there was not a discovery on those claims. That decision did not declare the claims valid. The transcript, exhibits, decision and findings of fact and conclusions of law in the earlier proceedings were received as evidence in the present proceedings by stipulation of the parties.

The hearing examiner in the instant case, after summarizing the evidence adduced at the hearing, pointed out that the requirements for a discovery are set forth in the prudent man test laid down by the Department in Castle v. Womble, 19 L.D. 455 (1894), judicially

approved in Chrisman v. Miller, 197 U.S. 313 (1905), and more recently reaffirmed in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963) 1/ and that a valid discovery requires more than a finding of mineral indications that would warrant only further exploratory work to determine whether a valuable mineral deposit exists within the limits of the claim, citing United States v. Henault Mining Co., 73 I.D. 184 (1966), affirmed Henault Mining Co. v. Tysk, 419 F. 2d 766 (9th Cir. 1969), cert. denied, Henault Mining Co. v. Zaidlicz, Sup. Ct. No. 1460 (June 8, 1970). This principle was sustained in Converse v. Udall, 339 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969), decided after the hearing examiner's decision in the present contest.

The hearing examiner found, after considering the evidence presented at both hearings, that the nature of the mineralization, its quality and quantity and the estimates of mining costs did not show by a preponderance of evidence that a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on these claims. He noted that the contestee did not claim to have found a deposit which in itself has value for mining purposes, but only that the findings of some mineral value justifies further expenditure in time and money in exploring for deposits which may reasonably be expected to be found. The examiner concluded that the contestee did not show that he had made a discovery of a valuable mineral deposit within the limits of any of the contested claims. He declared the claims invalid and rejected the patent applications.

The appellant's stated reasons for appeal to the Secretary are that he adopts by reference the statement of reasons for his appeal to the Director, Bureau of Land Management, and incorporates by reference the hearing examiner's decision and findings of fact and conclusions of law in Arizona Contest No. 10013, together with all the testimony, pleadings and exhibits filed in that case, as they relate to mining claims involved in this contest.

In appealing to the Director, Bureau of Land Management, appellant challenges the hearing examiner's decision as being contrary to the evidence, questions the Government mineral examiner's sampling of the claims, adverts to the higher values shown in samples of the appellant, contends that the 1957 hearing examiner's decision dismissing the complaint against the Leo Nos. 2 and 4, Alta Vista Nos. 1 and 2, and Turkey Track No. 3 lode claims is res adjudicata as to them, and asserts that prospecting by a small operator is not distinguishable from development activities.

1/ "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

The entire record, which includes the 1957 proceeding, has been reviewed. We have carefully considered the decision of the Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, which summarizes the evidence and discusses the points raised by the appellant, and find that the discussion and findings are correct. In view of the fact that appellant has not presented any new issues on appeal to the Secretary, there is no need to repeat the discussion and findings. It is sufficient to state that we adopt the Bureau's decision 2/, which affirms, for the reasons stated therein, the hearing examiner's decision holding the contested mining claims invalid and rejecting the mineral patent applications for them.

Therefore, pursuant to the authority delegated to the Office of Hearings and Appeals, Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

_____
Francis Mayhue, Member

I concur: I concur:

_____ _____
Martin Ritvo, Member Edward W. Stuebing, Member

2/ Bureau decision appended hereto.

BUREAU OF LAND MANAGEMENT DECISION (January 31, 1969)

Decision Affirmed

Mr. H. B. Webb has appealed from the Hearing Examiner's decision dated March 29, 1967, determining the above-identified mining claims to be null and void for failure to show a discovery of a valuable mineral deposit within the limits of the claims and rejecting the patent application for the claims.

By decision dated December 23, 1957, a hearing examiner dismissed a complaint, Arizona Contest No. 10013, against the Leo Nos. 2 and 4, Turkey Track No. 3, and Alta Vista Nos. 1 and 2 lode claims for the reason that the Bureau had failed to show that there was not a discovery on these claims. The examiner held that the Bureau mineral examiners had failed to sample places on these claims where a witness for Mr. Webb testified he found valuable deposits of gold and silver. No appeal was taken from that decision. Thereafter, Mr. Webb filed applications for mineral patents Arizona 032789 and 034090 for the claims now in issue. The Bureau then initiated the present contests against the claims and mineral patent applications, charging that valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining law. Answers to both contest complaints were filed by Mr. Webb's attorney. A hearing was held before the Hearing Examiner on November 8 and 9, 1966. The transcript and exhibits of the earlier hearing were offered and received as evidence in the present proceedings, together with an additional showing offered by both parties.

At the hearing it was established that a mine had operated on the Leo Nos. 3 and 4 claims during the eighties (Tr. 152), and in 1928 it was reactivated and several thousand dollars worth of bullion was produced from ore containing from $12 to $16 worth of gold per ton. The mine was abandoned until 1934, when it was worked on a small scale with unknown results.

A Bureau mineral examiner, after qualifying as a trained mining engineer, established that Mr. Webb sent his son on each of the contested claims with the examiner to point out for verification each place deemed a discovery point (Tr. 316-317). The mineral examiner testified as to the manner in which he sampled each of these places that was available for examination together with other places on the claims he considered worthy of sampling. A consulting mining engineer employed by Mr. Webb testified that material

had washed down and covered some places on the claims (Tr. 208). There are also shafts on the property that are too dangerous to enter (Tr. 188, 246) – in fact the Bureau examiner sampled in one shaft that the consulting mining engineer would not enter (Tr. 217).

On the Alta Vista No. 1 claim, the Bureau mining engineer took four samples from an exposure identified by Mr. Webb's son as the discovery point, and he obtained representative assay values of $8.40, $6.30, $4.90 and $1.40 per ton for gold; the highest value for silver was 77 per ton (Tr. 51-55; Exhs. 23, 24). Instead of sampling the designated discovery point, the contestee's consulting mining engineer cut one sample from an area of tiny quartz stringers across an aggregate of 14 inches (Tr. 216). The witness sampled by throwing away rock wall and selecting just vein material for his composite sample (Tr. 216). The sample when assayed showed representative values per ton of $35 for gold and $1 for silver (Exh. E).

On the Alta Vista No. 2 claim, the Bureau mineral examiner sampled a pit indicated by the son as a discovery point, and the sample showed representative values of $1.05 per ton in gold and 50 per ton in silver (Tr. 67-68; Exh. 24). A chip sample near the southwest corner of the claim assayed representative values of $4.20 per ton in gold and 62 per ton in silver (Tr. 69-70; Exh. 25). Three samples from a four foot pit near the boundary of the claim with the Leo No. 2 claim reflect the spotty mineralization of the area, since the samples assayed representative values of $8.75, 35 and 35 per ton in gold, with a high value for silver of only 62 per ton (Tr. 71-73; Exhs. 26, 27). A sample of the material which assayed less than a dollar increased to representative values of $3.50 per ton in gold and 37 per ton in silver when only vein material was sampled (Tr. 73; Exh. 27) – which demonstrates that the manner in which an area is sampled is reflected in the assay values revealed. Again, the contestee's consulting mining engineer did not sample the indicated discovery point, but collected material with a pick from quartz stringers exposed on the claim, which assayed representative values of $36.05 per ton in gold and 75 per ton for silver (Tr. 215; Exh. E). The consulting mining engineer conceded that he avoided taking rock wall with his sample (Tr. 215), so the selective sample would reflect lesser values if cut by practical mining procedures when expanded to a three foot minable width (Tr. 339, 345).

The Bureau mineral examiner took two chip samples from a 15 foot long inclined shaft on the Leo No. 1 claim which had been shown to him by Mr. Webb's son as the discovery point. The samples both assayed representative values of 35 per ton for gold -- they assayed $5.37 and $3.12 per ton for silver (Tr. 85-86; Exh. 28). The contestee's consulting mining engineer again did not testify concerning the discovery point, but showed that he sampled some quartz out-croppings on this claim which assayed represented values of $28.35 per ton for gold and 50 per ton for silver (Tr. 216; Exh. E). Again the witness selected only vein material (Tr. 216).

On the Leo No. 2 claim the Bureau mineral examiner took three samples, including sampling of the designated discovery point, and these samples showed representative values of $4.20, $4.20 and 17 per ton for gold and all samples assayed 37 per ton for silver. The consulting mining engineer again chose a different place on this claim, a quartz vein, and obtained a sample that assayed representative values of $28.35 per ton for gold and 50 per ton for silver (Tr. 216-217; Exh. E).

Mr. Webb has his residence on the Leo No. 3 claim. This claim is the most interesting of the contested claims. It is the claim upon which most of the old mine workings are found. Mr. Webb testified at both hearings that this is the claim which he plans to commence to mine (Tr. 324). This is the only claim on which the contestee's consulting mining engineer obtained a sample which consisted of material from one vein and is not merely a composite of material selected from several tiny veinlets or stringers (Tr. 228). Mr. Webb's son showed the Bureau mineral examiner a remaining pillar in an old stope as the discovery point, but Mr. Webb agrees that the pillar cannot be mined without the stope caving in. Nevertheless, the Bureau mining engineer sampled the pillar and obtained assayed representative values of $11.90 and $9.10 per ton for gold and 52 and 50 per ton for silver (Tr. 87-88; Exhs. 23, 28). The consulting mining engineer chose a different place on the claim, a bulldozed area near the old mine on which he exposed an 18 inch wide vein the Saturday before the hearing (Tr. 212, 222-223). The witness had the vein drilled into for a depth of six feet with a drill approximately 2 1/2 inches wide (Tr. 218-219). From the dust blown from this small drill hole he composed a sample which assayed representative values of $42.70 per ton for gold and 75 per ton for silver (Exh. E). Mr. Webb also sampled a vein on this claim, it is not certain whether it was the same vein examined by his expert witness, and the claimant testified that from a drill

hole and a shaft he obtained samples with assayed representative values of $87.50 and $45.50 per ton for gold (Tr. 295-297). Since the contestee testified that it would be too dangerous to mine the shaft, that sample is not significant (Tr. 297). Because the contestee appears to stress the significance of the vein on this claim, we, by way of example, have computed the value of the $42.70 gold sample taken with a 2 1/2 inch drill by diluting the sample to a 36 inch minable width, and such sample would then merely represent values for gold of $2.26 per ton.

The Bureau mineral examiner took a sample from the place shown to him by the son as the discovery cut on the Leo No. 4 claim, but it only assayed representative values of 17 per ton for gold and 25 per ton for silver (Exh. 28). Mr. Webb testified that his son cut a sample from this claim that assayed representative values of $11.20 per ton for gold (Exh. D), but, since the witness is uncertain as to where the sample was cut, such testimony can be given little weight (Tr. 298).

In a place designated by Mr. Webb's son as a discovery point on the Turkey Track No. 3 claim, the Bureau mineral examiner took four channel samples and obtained no assay values representing higher than 17 per ton for gold and 87 per ton for silver (Tr. 24-36, 40-48; Exhs. 19, 20, 21). The mining claimant's expert witness again did not testify concerning this place, but chose a vein 18 inches wide. He cut a sample from this vein that assayed representative values of $18.90 per ton for gold and 37 per ton for silver. Illustrative that such narrow veins would diminish considerably in values when expanded to a three foot minable width, the witness then cut two samples from the walls of this vein and obtained representative assay values of only $3.50 and $1.40 per ton for gold and 25 and 50 per ton for silver (Exh. F). The consulting mining engineer agreed he had not found a discovery on this claim (Tr. 256).

The veins described on the claims are small or their size has not been determined. The mineralization is spotty on every claim. The terrain is generally rough (Tr. 11) and some of the purported discovery sites can only be reached on foot (Tr. 13, 15). The places mined previously with possible success are no longer accessible. Mr. Webb purchased the claims in February 1956 (1957 Hr. Tr. 215), but he has never mined or sold any material from any of the claims (Tr. 318).

The evidence of sampling done at the earlier hearing is similar to that discussed above -- the samples offered in evidence by the contestee showing higher representative assay values than those shown from samples cut by Bureau mineral examiners. At both hearings the testimony showed that the parties did not sample the same places and there was no joint sampling. The significant difference in the evidence adduced at the present hearing is that this time the Bureau mineral examiner provided the mining claimant with an opportunity to show the former the deposits on which he asserted a discovery and the Bureau mining engineer examined each such place and was not able to verify that sufficient quality and quantity of values were present to be economic to mine.

Factors relevant to a determination as to whether a valid discovery has been made include the cost of mining or extraction, transportation and processing. United States v. R. W. Wingfield, A-30642 (February 17, 1967). The Bureau mining engineer estimated that it would cost $21.41 per ton direct costs to operate on the claims with a two man crew moving six tons of material a shift (Exh. 31), and the claims are not at present in a condition for such an operation. The equipment on the claims is not adequate for mining operations (Tr. 196, 198).

At the contest hearing held in 1957, Mr. Webb testified that he planned to work the old mine on the Leo No. 3 claim, and work the other claims in connection with this operation (1957 Hr. Tr. 219, 220). At the hearing held in 1966, Mr. Webb testified that he never embarked upon the drilling program he had described at the earlier hearing because he later found it would be too expensive to make the old mine safe to enter (Tr. 331). Instead, Mr. Webb testified that in approximately 1961 he found an 18 inch vein on the Leo No. 3 claim which he plans on mining for a year or more before entering the old mine (Tr. 324, 332). Mr. Webb's son had not told the Bureau mineral examiner about this vein.

The appellant asserts that the issues posed by the present contest proceeding are res judicata in view of the dismissal of the earlier contest proceeding against some of the mining claims. The principle of res judicata (or its administrative law counterpart-the doctrine of finality of administrative action) has no application to the Department relating to disposition of the public domain until legal title passes. United States v. United States Borax Company, 58 I.D. 426 (1943). The important aspects of the Secretary's powers as

guardian of the public lands are that it is primarily a power over lands and that all proceedings with relation to any particular public land are merely steps in a continuous proceeding in rem, never finally terminated until legal title passes. The Secretary must be especially astute to ascertain the facts in a case of this kind by guarding against any substantial error before authorizing the issuance of patents, for the ultimate issue now is whether it is proper for the Secretary to convey title to the land under the general mining laws. Thus, the Department held in United States v. LaFortuna Uranium Mines, Inc., A-29852 (May 4, 1964), that the fact that a mining claim may at one time have been found to be a valid claim does not estop the Department, under the principle of res judicata, from bringing an adverse proceeding against the claim to determine whether there is a present valid discovery on the claim when an application for patent to the claim is subsequently filed. Moreover, the Hearing Examiner's decision in Arizona Contest No. 10013, supra, did not determine that a valid discovery had been shown on any of the claims, 1/ but merely held that the contestant had failed to establish that no discovery had been made. The doctrine of finality of administrative action is not applicable to the contest proceedings now under consideration by reason of the decision in the earlier proceeding relating to some of the same mining claims.

The appellant questions the accuracy of the sampling methods of the Government mineral examiners, basing his objection upon the low assay values obtained by these examiners when compared with those samples cut by himself and his consulting mining engineer which were assayed and offered in evidence. As stated, the samples taken by each of the parties are not from the same places. The Bureau mineral examiner in the present proceeding examined and sampled every place designated as a discovery point. It is the duty of a mining claimant whose claims

1/ In that decision we note that the Hearing Examiner concluded "* * * that the contestant has failed to establish, by a preponderance of the evidence, the truth of the charges filed against those claims * * *." The Courts and the Department have consistently held that when the Government establishes a prima facie case, the contestee has the burden of proving the issue of discovery by a preponderance of the evidence, not merely evidence of equal weight. Converse v. Udall, 262 F. Supp. 583, 596 (D. Ore. 1967), aff'd 399 F. 2d 616 (9th Cir. 1968). Although the conclusion placed an improper burden of proof upon the contestant, it is clear from a reading of the entire decision that the Hearing Examiner held that the contestant had failed to rebut the contestee's allegation of discoveries by not examining the places asserted as the discovery points.

are being contested or who seeks mineral patent to keep discovery points available for inspection by Government mineral examiners, and an examiner has no duty either to rehabilitate discovery points or to explore beyond the current workings of the mining claimant in an effort to verify a purported discovery. The Government need not make the exhaustive examination that a claimant would do in prospecting. See United States v. Thomas C. Wells, A-30805 (January 8, 1968). The function of the Government is one of investigating for the purpose of verifying, if possible, the claimed discovery. Then the mining claimant has the burden of showing what the Government mineral examiners missed. United States v. Frank Coston, A-30835 (February 23, 1968). The Bureau mining engineer examined all places shown to him, he also examined other places that he deemed likely to be significant. We note that some of the claims have little in the way of workings upon them, and some of the workings have been allowed to be covered or otherwise become inaccessible. The Bureau mineral examiner established a prima facie case of no discovery by his testimony that he had examined the exposed workings on each claim, that he had taken mineral samples from every point suggested by the representative of the mining claimant as demonstrating the best values found on the claims, and that he had found no deposit of sufficient quality and quantity to make a profitable operation reasonably possible. United States v. Mrs. Frances Swain, A-30926 (December 30, 1968). From the record, it appears that the Government mineral examiner used approved methods in examining the claims, and the appellant's showing that he and his witness obtained greater values in other places does not impeach the contestant's sampling procedures.

Concerning the evidence of samples cut by the mining claimant and his consulting mining engineer, several of the samples from drill holes and other samples are merely selective samplings and do not accurately represent the area sampled. Furthermore, an assay value not related to a minable width is meaningless in itself. United States v. Jesse W. Crawford, A-30820 (January 29, 1968), footnote four. A vein of less than minable width will bring down the assayed value of a mineral deposit in a combination of ways-by diluting the ore with barren country rock, and by increasing mining costs through additional handling of barren rock (both in sorting the barren rock from the ore and in removing the barren rock to get to the vein). United States v. R. W. Wingfield, supra. The strongest vein the appellant has referred to is the 18 inches wide vein on the Leo No. 3 claim, which is only half of a minable width. Although the appellant has found ore samples with indicated values, before dilution to a minable width, as high as $87.50 per ton, the record based upon a few isolated high value samples does not support a finding that he has found a deposit yielding ore in excess of the cost of mining it. Isolated values

occurring in a vein which only suggest the possible existence of a valuable mineral deposit in the course of the vein merely call for further exploration to find the deposit supposed to exist. United States v. Kenneth O. Watkins et al., A-30659 (October 19, 1967). The basic problem here lies in the failure of the patent applicant to establish the quality of any ore the quantity of which can be estimated.

The Secretary of the Interior is not authorized to issue a patent to mining claims until he is satisfied that the requirements of discovery have been shown. United States v. New Jersey Zinc Company, 74 I.D. 191, 205 (1967). Before mineral patents can be issued it must be shown as a present fact that the mining claim is valuable now for minerals. Little weight can be given to the testimony relating to the nature of past workings which are now not accessible. United States v. R. W. Wingfield, supra. The examination by the Bureau mineral examiner of each purported discovery point suggested by the patent applicant's representative failed to verify a deposit of sufficient quality and quantity to be mined with a reasonable expectation of making a profit. The few isolated samples offered in evidence by the patent applicant from an area of higher mineral concentration are not representative of the claim from which each was cut, and, consequently, must properly be denied substantial weight. United States v. August Herman, 72 I.D. 307, 312 (1965). The mineral patent applicant has not shown that there is now a mineral deposit on any of the claims that has economic significance and would be worth developing, but he may be warranted in exploring further. The appellant asserts that prospecting by a small operator is not distinguishable from development activities. However, the Department has consistently held that evidence that might encourage further prospecting or exploration is not a discovery within the mining laws. See United States v. C. B. Myers et al., 74 I.D. 388 (1967).

For the reasons stated, the Hearing Examiner's decision holding that the mining claims are null and void and rejecting the appellant's mineral patent applications for these claims is affirmed.

* * * (Paragraph involving for appeal deleted) * * *

/s/ Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings